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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900-AM55

Schedule for Rating Disabilities; Evaluation of Scars; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Final rule; correction.

SUMMARY: The Department of Veterans Affairs (VA) published in the Federal Register of September 23, 2008, a document amending its Schedule for Rating Disabilities by revising that portion of the Schedule that addresses the Skin, so that it more clearly reflected VA's policies concerning the evaluation of scars. In the preamble of that document, VA incorrectly stated the applicability date. VA made a similar error in the first sentence of the introductory paragraph of 38 CFR 4.118. This document corrects the error in the applicability date.

DATES: This correction is effective [Insert date of publication in the Federal Register]. The applicability date of rule document E8-21980 on page 54708 in the issue of Tuesday, September 23, 2008, is corrected as of October 23, 2008.

FOR FURTHER INFORMATION CONTACT: William F. Russo, Deputy Director, Office of Regulation Policy & Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, or call (202) 461-4902 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On September 23, 2008, VA published in the Federal Register (73 FR 54708), an amendment to that portion of the Schedule for Rating Disabilities that addresses the Skin, 38 CFR 4.118, by revising the criteria for the evaluation of scars. In the DATES section of the rule document, we incorrectly stated the applicability date. As published, the relevant portion of the applicability date paragraph read, “This amendment shall apply to all applications for benefits received by VA on or after October 23, 2008. A veteran whom VA rated before such date under diagnostic codes 7800, 7801, 7802, 7803, 7804, or 7805 of 38 CFR 4.118 may request review under these clarified criteria” We made a similar error by amending 38 CFR 4.118 to state, “A veteran who VA rated under diagnostic codes 7800, 7801, 7802, 7803, 7804, or 7805 before October 23, 2008 can request review under diagnostic codes 7800, 7801, 7802, 7804, and 7805”

As a result of the errors in the applicability date and in amended § 4.118, the rule document and the regulation are unclear about whether veterans whose claims were filed before October 23, 2008, but were not rated before that date may request review under the new criteria. A strict, literal reading of the applicability-date language and § 4.118 might suggest that veterans with such unrated claims would be rated under the old criteria with no opportunity to request review under the new criteria. We intended such claims to be rated under the old criteria subject to the right of the claimant to request review under

the revised criteria. Neither the applicability-date language nor § 4.118 addressed whether veterans with such claims may request review. We did not intend the strict reading because it would be irrational to deny the opportunity for review under the new criteria to persons whose pending claims had not yet been rated before October 23, 2008, while providing the opportunity to persons whose claims had been rated, even though all of the claims had been filed before that date.

This correction document adds a new second sentence to the applicability date paragraph, “The old criteria will apply to applications received by VA before that date.” To be consistent with the new second sentence, this correction document also revises the third sentence (the original second sentence) to state, ““However, a veteran whose scars were rated by VA under a prior version of diagnostic codes 7800, 7801, 7802, 7803, 7804, or 7805 of 38 CFR 4.118, as in effect prior to the effective date of this rule, may request review under these clarified criteria, irrespective of whether his or her disability has worsened since the last review.” Note that the “rated by VA under a prior version” language would encompass claims that have received an initial rating but are still pending in the appeals process.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Approved:

William F. Russo,
Deputy Director,
Office of Regulation Policy & Management
Office of the General Counsel
Department of Veterans Affairs

For the reason set out in the preamble, in rule document E8-21980 on page 54708 in the issue of Tuesday, September 23, 2008, make the following corrections:

1. In the second column of page 54708, under the DATES section, in the Applicability Date paragraph, revise the second sentence to read, “However, a veteran whose scars were rated by VA under a prior version of diagnostic codes 7800, 7801, 7802, 7803, 7804, or 7805 of 38 CFR 4.118, as in effect prior to the effective date of this rule, may request review under these clarified criteria, irrespective of whether his or her disability has worsened since the last review.”

2. In the second column of page 54708, under the DATES section, in the Applicability Date paragraph, add as a new second sentence, “The old criteria will apply to applications received by VA before that date.”

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